

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
Norfolk Division

DWAYNE L. JOHNSON, (#1059153),

Petitioner,

v.

CIVIL ACTION NO. 2:23cv553

COMMONWEALTH OF VIRGINIA,

Respondents.

DISMISSAL ORDER

Johnson originally filed his claims under 42 U.S.C. § 1983. See Johnson v. Commonwealth of Virginia, No. 2:23cv312. After review of his filings, the court determined that the only relief Johnson seeks is an order vacating one or more of his state convictions or sentences. Accordingly, on October 30, 2023, the court entered an Order directing the clerk to administratively terminate the § 1983 action and docket Johnson's filings as a new matter to proceed under 28 U.S.C. § 2254. Id. (ECF No. 5).

Johnson's filings allege he was originally convicted in 2001, in the New Kent County Circuit Court of capital murder and conspiracy to commit capital murder. While Johnson's filings do not state the sentence he received for these convictions, his prior habeas actions reveal he was sentenced to serve a prison term of life without the possibility of parole and twenty years on the respective counts. His current § 2254 petition challenges the same 2001 convictions and sentences that he

previously challenged in Civil Action Nos. 2:05cv510, 2:07cv358, 2:16cv100, and 2:18cv193. Thus, his current petition appears to fall under the successive petition provisions of the federal habeas statute.

The court entered a Show Cause Order directing Johnson to show cause why this matter should not be dismissed as successive pursuant to 28 U.S.C. § 2244(b)(3)(A). (ECF No. 10). Johnson filed a response to the Show Cause Order, however, the filing does not allege any basis to permit a successive filing in this court. (ECF Nos. 11).

The matter was referred to a United States Magistrate Judge pursuant to the provisions of 28 U.S.C. §§ 636(b)(1)(B) and (C) and Rule 72(b) of the Federal Rules of Civil Procedure. On January 30, 2024, the Magistrate Judge prepared a Report and Recommendation for Dismissal, recommending that Johnson's petition be dismissed as successive. (ECF No. 12). Johnson was advised of his right to file objections to the Report and Recommendation. Johnson filed objections to the Report and Recommendation (ECF No. 13), however, his objections still do not state any basis to permit a successive filing in this court, therefore, his current petition falls under the successive petition provisions of the federal habeas statute.

"[B]efore a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of

appeals for an order authorizing the district court to consider the application."

28 U.S.C. § 2244(b)(3)(A). This court has not received an order from the Court of Appeals for the Fourth Circuit authorizing the consideration of petitioner's successive application for a writ of habeas corpus. Accordingly, this Court is precluded from considering petitioner's application for a writ of habeas corpus.

The court, having reviewed the record and examined the objections filed by Petitioner to the Report and Recommendation, and having made de novo findings with respect to the portions objected to, does hereby adopt and approve the findings and recommendations set forth in the Report and Recommendation filed January 30, 2024. It is, therefore, ORDERED that Johnson's petition (ECF No. 1) be DENIED and DISMISSED without prejudice to his right to present his claims at a later date, should he obtain authorization to do so from the Fourth Circuit.

Finding that the basis for dismissal of Petitioner's § 2254 petition is not debatable, and alternatively finding that Petitioner has not made a "substantial showing of the denial of a constitutional right," a certificate of appealability is **DENIED**. 28 U.S.C. § 2253(c); see Rules Gov. § 2254 Cases in U.S. Dist. Cts. 11(a); Miller-El v. Cockrell, 537 U.S. 322, 335-38 (2003); Slack v. McDaniel, 529 U.S. 473, 483-85 (2000).

Petitioner is **ADVISED** that because a certificate of appealability is denied by this Court, he may seek a certificate from the United States Court of Appeals for the Fourth Circuit. Fed. Rule App. Proc. 22(b); Rules Gov. § 2254 Cases in U.S. Dist. Cts. 11(a). If Petitioner intends to seek a certificate of appealability from the Fourth Circuit, he must do so within thirty (30) days from the date of this Order. Petitioner may seek such a certificate by filing a written notice of appeal with the Clerk of the United States District Court, United States Courthouse, 600 Granby Street, Norfolk, Virginia 23510.

The Clerk is DIRECTED to mail a copy of this Dismissal Order to Petitioner at the following addresses:

DWAYNE L. JOHNSON, #1059153  
VA DOC Centralized Mail Distribution Center  
3521 Woods Way  
State Farm, VA 23160

A copy of the Dismissal Order shall also be served on the Respondent and the Attorney General by CM/ECF pursuant to their Agreement on Acceptance of Service with the Court.

\_\_\_\_\_/s/   
MARK S. DAVIS  
CHIEF UNITED STATES DISTRICT JUDGE

Norfolk, Virginia  
March 4, 2024